**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Complaint of WorldCom Technologies, Inc. )

Against New England Telephone and Telegraph ) D.T.E. 97-116

Company, d/b/a Bell Atlantic-Massachusetts )

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Complaint of Global NAPs, Inc. )

Against New England Telephone and Telegraph ) D.T.E. 99-39

Company, d/b/a Bell Atlantic-Massachusetts )

)

**OPPOSITION OF**

**BELL ATLANTIC–MASSACHUSETTS**

Bell Atlantic-Massachusetts ("BA-MA") respectfully submits that Global NAPs ("GNAPs") has failed to provide any basis for the Department to vacate its Orders of May 19, 1999 (D.T.E. 97-116-C) and

February 25, 2000 (D.T.E. 97-116-D and 99-39) and to reinstate the Order dated October 21, 1998 (D.T. E. 97-116). GNAPs misstates the significance of the recent Court of Appeals ruling in *Bell Atlantic Telephone Companies v. FCC* on the Department decisions it attempts to vacate. The Court's decision concerning the Federal Communications Commission's ("FCC") *Internet Traffic Order* does not undercut the Department's Orders in D.T.E. 97-116-C and D.T.E. 97-116-D as GNAPs contends. The Court did not rule that Internet-bound traffic is "local" and subject to reciprocal compensation; it remanded the matter to the FCC only for a clearer explanation of the agency's earlier decision. The Department should, therefore, deny GNAPs' Motion to vacate its Orders and await the FCC's ruling in the remand proceeding before taking any other action in this case.

## I. DISCUSSION

### A. The Court of Appeal's Decision Does Not Support Vacating the Department's D.T.E. 97-116-C and D.T.E. 97-116-D Orders.

GNAPs' Motion rests on a simple, but erroneous, proposition – the Court of Appeals vacated the *Internet Traffic Order*, *ergo* the Department's D.T.E. 97-116-C and D.T.E. 97-116-D Orders must also be vacated. According to GNAPs, "as a matter of law, the Department no longer has the discretion it perceived as a result of the FCC's vacated order" and must reinstate the 97-116 Order (Motion, at 3). GNAPs is wrong concerning the significance of the Court's ruling on the Department's decisions.

Since the outset of this case, the Department has proceeded on the basis that resolving the status of Internet-bound calling rested on the jurisdictional classification of such traffic under applicable FCC precedent. The Department's initial ruling in this case on October 21, 1998, was based on an interpretation of FCC precedent which the Department believed required that it classify Internet-bound traffic as jurisdictionally "local" traffic on the basis of the so-called two-call theory. *MCI WorldCom*, D. T.E. 97-116, at 11-13. As the Department later explained, it reached this decision:

> *not* because we felt that it was a good policy or that it promoted competition, *but* because we felt bound by the then-current state of decisional law, relying to a large degree on the FCC's own previous pronouncements to the effect that Internet calls represented two distinct services …

*MCI WorldCom*, D.T.E. 97-116-C at 37 (emphasis in original).

The Department affirmed in its D.T.E. 97-116-D Order that its initial decision rested on the premise that the jurisdiction of Internet traffic would be deemed "local" by the FCC under a two-call theory.

> Our finding in D.T.E. 97-116 that ISP-bound calls were "local" within the meaning of that term as used in interconnection agreements was based on the conclusion that such traffic was jurisdictionally local because the

> communication appeared to be severable into two components.

*MCI WorldCom*, D.T.E. 97-116-D at 18.

The FCC's *Internet Traffic Order* established that the Department's initial interpretation of FCC precedent regarding the jurisdiction of Internet-bound traffic was in error. In D.T.E. 97-116-C, the Department succinctly explained why the earlier ruling could not stand:

> The Department's October Order [D.T.E. 97-116] thus confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling. This limitation of the basis for the Department's holding was express; and no other basis may be reasonably inferred from the Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion.
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> As it happens, the Department's "two-call" theory cannot be squared with the FCC's "one-call" analysis. In rendering its "two-call" decision on reciprocal compensation for ISP-bound traffic, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's.

*MCI WorldCom*, D.T.E. 97-116-C, at 22.

The Department's rationale for vacating its D.T.E. 97-116 Order was thus based on the fact that it rested on an erroneous interpretation of FCC precedent and thus was based on a "mistake of law, *i.e.*, on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate." *MCI WorldCom*, D.T.E. 97-116-C at 24.

The Court of Appeals did not find that the FCC's analysis in the *Internet Traffic Order* was wrong as a matter of law or that it was an impermissible interpretation of the 1996 Act's provisions relating to reciprocal compensation. The Court also did not find that the two-call theory – which the Department relied on in the October 1998 Order – was appropriate for determining the jurisdiction of Internet-bound traffic or was required under the Act. On the contrary, the Court did not question that the end-to-end analysis used in the *Internet Traffic Order* is a sound jurisdictional analysis or that the FCC has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. 206 F.3d at 5. The Court took issue with the FCC's ruling because "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications [*i.e.*, Internet-bound calls] as continuous works for purposes of reciprocal compensation." 206 F.3d at 7. Because it felt that the FCC's "use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this

context" (*id.*, at 6) the Court remanded the matter to the FCC to supply "a real explanation for its decision to treat end-to-end analysis as controlling." *Id.*, at 8.

The Court did not rule on the proper classification of Internet-bound traffic – it left that up to the FCC. What the Court has required of the FCC is an explanation of how the end-to-end analysis conforms with the terms of the 1996 Act and how it relates to the FCC's regulatory treatment of Internet Service Providers. Since it has been the clear intention of the Department to follow the FCC's classification of that traffic, the Department has no basis for taking any action in this case to either vacate or reinstate any of its rulings until the FCC provides the further explanation mandated by the Court.

GNAPs' claim that the Department is required as a matter of law to reinstate the October 1998 Order in light of the Court's decision is clearly wrong. As discussed above, that Order was based on an interpretation of FCC precedent regarding the jurisdictional classification of Internet-bound traffic and rested solely on the Department's understanding that it was *required* under that precedent to find that Internet-bound traffic was jurisdictionally "local" traffic. The *Internet Traffic Order* established conclusively that the Department misconstrued applicable FCC precedent in the October 1998 Order. The Court of Appeals decision does not alter the fact that the Department mistakenly applied that FCC precedent. The Court did not reverse the FCC's decisions that have consistently treated Internet traffic as jurisdictionally interstate communications. Nor did the Court adopt a specific rule concerning the jurisdiction of that traffic. At this point, the Court has required only that the FCC explain how its precedent regarding the jurisdictional analysis relates to specific terms of the Act. Although the Court vacated the *Internet Traffic Order*, it did not erase the FCC's one-call precedent for determining the jurisdiction of traffic. Thus, the premise underlying the Department's October 1998, *i.e.*, that the FCC would use a two-call theory to determine the jurisdiction of traffic, remains legally and factually erroneous. Again, until the FCC further explains its reasoning in the remand proceeding, the Department should not take any action in this case.

**B. The Department's Orders Are Not Unfair and Anticompetitive.**

GNAPs also contends that by vacating its D.T.E. 97-116-C and D.T.E. 97-116-D Orders and reinstating the D.T.E. 97-116 Order, the Department "will redress fundamentally unfair and anticompetitive results." GNAPs Motion at 3**.** This baseless contention is contrary to the Department's prior determinations.

The Department has already found that the inter-carrier compensation scheme GNAPs wants to reinstitute for Internet traffic is neither fair nor pro-competitive. The Department has determined that "[t]he unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications." *MCI WorldCom*, D.T.E. 97-116-C, at 32. The Department explained why this is the case:

> … it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or

> shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition [footnote omitted]. *A loophole, in a word.* There is, however – and we emphasize this point – nothing sinister or even improper about taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprises like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited. Create an opportunity and inventive enterprise will seize upon it. It was ever thus. But regulatory policy, while it may applaud such displays of commercial energy, ought not create such loopholes or, once having recognized their effects, ought not leave them open.

*Id.*, at 32-33, emphasis added.

GNAPs' Motion seeks nothing less than a reopening of the loophole that the Department closed in its D. T.E. 97-116-C and D.T.E. 97-116-D Orders. To reopen that loophole while the issue is before the FCC is neither sound regulatory policy nor required by the Court of Appeals decision.

The Department should not permit CLECs to benefit from what the Department has determined is a "regulatory anomaly" while the matter is before the FCC. As the Department has already found once in this case: "Clearly, continuing to *require* payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of certain CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders." *Id.*, at 34-35.

## II. CONCLUSION

The Court of Appeals' decision in *Bell Atlantic Telephone Companies v. FCC* does not support GNAPs' Motion. The Court did not reverse FCC precedent regarding the proper analysis for determining the jurisdiction of traffic but has remanded the issue to the FCC for it to further explain how that precedent relates in the case of Internet-bound traffic to the provisions of the 1996 Act. Until the FCC acts, there is no basis for the Department to vacate the D.T.E. 97-116-C and D.T.E. 97-116-D Orders.

Respectfully submitted,

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